IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1319 OF 2004

Martin Alwaris ...Petitioner

Versus

Shafi Mohammed Kasam & Ors. ...Respondents

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Mr. M.M. Vashi h/f M.P. Vashi & Associates, counsel for Petitioner

Mr. D.S. Sawant with Mr. M.A. Attar, counsel for Respondent No.1.

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CORAM: B. H. MARLAPALLE, J.

DATED: 29TH MARCH, 2005

P. C.:-

1. Heard Mr. Vahsi, the learned counsel for the petitioner and Mr. Sawant with Mr. Attar the learned counsel for the respondent No.1 and Mr. S.N.Kadam, Second Assistant to Court Receiver, i.e. the respondent No.2 who is a formal party.

2. Rule. Respondents waive service. Rule made returnable forthwith.

3. The respondent No.1 had filed S.C. Suit No. 4201 of 1992 in the City Civil Court at Bombay and impleaded the present petitioner as the defendant No.1, present respondent No.2 as defendant No.2 and

the Senior Inspector of Police, Kurla Police Station as defendant No.3. In the plaint he had contended that the suit gala No. B-23A, situated at Maksood Estate, Kismat Nagar, C.S.T. Road, Kurla, Bombay, was purchased by him from the defendant No.2 and in collusion with the defendant No.1, the defendant No.3 has dispossessed him of the said Gala on 23.4.1992. This act of defendant No.3 was illegal and therefore, he sought declaration and directions in the suit. Prayer clause (a) and (b) in the suit read as under:-

> (a) It may be declared that the plaintiff is entitled to use, occupation and possession of suit premises viz. Gala No. B-23A, Good Luck Auto Work, Maksood Estate, Kismat Nagar, Kurla, Bombay 400 070.
>
> (b) The defendant No.3, be directed by mandatory order of this Hon'ble Court that they should remove themselves from the suit premises viz. Gala No. B-23A, Good Luck Auto Work, Maksood Estate, Kismat Nagar, CST Road, Bombay - 70, forthwith.

4. In the said suit the plaintiff had also filed Notice of Motion No. 3627 of 1992 and it was made

absolute in terms of prayer clause (c) by appointing the Court Receiver, by order dated 25.11.1993. Accordingly, the Court Receiver took the possession of the suit gala on 12.1.1994, when there was no one to hand over the possession though the plaintiff had pointed out the suit gala. The Court Receiver remained in possession of the suit Gala for about ten years.

5. On 16.12.2003, the learned Advocate for the plaintiff applied for withdrawal of the suit for non prosecution. The learned advocate further stated that the plaintiff had handed over the suit Gala to the Court Receiver originally and therefore, the Court Receiver be discharged and the possession be restored back to the plaintiff from whom the Receiver took possession. These submissions were recorded in the order passed on 16.12.2003 by the learned Judge of the City Civil Court. However, while allowing him for withdrawal of the suit, the learned Judge on the issue of possession of the suit property directed as under:-

> "Receiver to hand over the possession after verifying his report to the concerned from whom possession was taken."

6. Surprisingly, the Court Receiver has handed over the possession of the suit property to the plaintiff and as per him on the basis of oral directions given by the learned Judge. The record placed before me indicates that on 20.12.2003 a report was submitted by Mr. S.A. Chachad to the Court Receiver regarding the hearing that had taken place on 16.12.2003 in the suit proceedings and this report states that after hearing the advocate for the plaintiff, the learned Judge orally directed Mr. Chachad to hand over the possession of the suit property to the plaintiff.

7. The grievance raised in this petition is regarding handing over the possession to the plaintiff and contrary to the order passed by the Court on 16.12.2003.

8. The report submitted by the Court Receiver when the possession of the suit property was taken over pursuant to the order dated 25.11.2003 shows that the suit property was not in possession of either the plaintiff or the defendants when the Court Receiver went to take possession and none of the parties had handed over the possession to the Court Receiver. This report has been placed on record of the trial court and therefore, the direction as quoted hereinabove, is required to be read in the context of this report. The direction could not be implemented

inasmuch as no person was in possession of the suit property when the Court Receiver had taken its possession originally pursuant to the order dated 25.11.1993. Notwithstanding this factual position, the Court Receiver has handed over the possession pursuant to the order dated 16.12.2003 to the plaintiff purportedly on the basis of the oral directions of the learned Judge of the City Civil Court. The possession of the property cannot be handed over in such a manner and if regards be had to the report available on the file, no one was entitled to take possession of the suit property since as per the contentions of the plaintiff he was dispossessed by the defendant No.3 forcibly and illegally on 23.4.1992 and admittedly, he was not in possession when he filed the suit. By withdrawing the suit he could not be allowed to circumvent the process of law. The Court Receiver is an officer of the Court and he could not be expected to act on the basis of so called oral directions lest it would have very serious implications on the judicial proceedings and may erode the faith of the litigants in the process of law. It was necessary for the Court below to settle the issue of possession of the suit shop by passing a reasoned order and it could not have been left to the Court Receiver. At the same time, the issue of possession of the suit shop cannot be decided in this petition and therefore, the parties

will have to be relegated to the Court below.

9. Hence, the petition succeeds and the same is hereby allowed partly. The impugned order dated 16.12.2003 to the extent of possession of the suit Gala is hereby quashed and set aside. The learned Judge of the trial court is hereby directed to hear all the concerned parties and pass fresh reasoned order regarding the possession of the suit gala to be handed over to either of the parties or to remain with the Court Receiver as the case may be. This shall be done as expeditiously as possible and in any case within a period of four weeks from today. In the meanwhile the Court Receiver shall restore the status-quo ante i.e. he shall take possession of the suit gala forthwith from the plaintiff.

10. Rule made absolute accordingly with no order as to costs. Writ to go forthwith to the trial Court.